No. 80-1360

MAR 24 1981

ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GENERAL ATOMIC COMPANY,
Appellant,

v.

UNITED NUCLEAR CORPORATION

and

INDIANA & MICHIGAN ELECTRIC COMPANY,
Appellees.

On Appeal from the Supreme Court of New Mexico

REPLY BRIEF

ROBERT H. BORK
142 Huntington Street
New Haven, Connecticut 06511
(203) 776-7662

JOHN BODNER, JR.
LAWRENCE R. VELVEL
BARBARA C. BIDDLE
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 783-0800

Counsel of Record for Appellant

[List of Attorneys on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

Of Counsel:

FRANK W. MORGAN
RANDALL S. HENDERSON
P.O. Box 1166
Pittsburgh, Pennsylvania 15230

MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037

RODEY, DICKASON, SLOAN, AKIN
& ROBB, P.A.
P.O. Box 1888
Albuquerque, New Mexico 87103

MONTGOMERY & ANDREWS, P.A.
P.O. Box 2307
Santa Fe, New Mexico 87501

GRAY, CARY, AMES & FRYE
2100 Union Bank Building
525 B Street
San Diego, California 92101

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REPLY BRIEF

I. This Case Impinges Directly Upon Foreign Affairs.

Appellees have rewritten the history of this case in an effort to evade its foreign policy implications. Nonetheless, the question at the core of this issue is: Does a state court have jurisdiction over a foreign government cartel established as a regulatory action, and can the court default a party because a foreign government refuses to allow production of documents in its country relating to this regulatory action.

A. Appellees' major argument is that the New Mexico courts have jurisdiction over acts allegedly done in the United States and can therefore require the production of foreign documents decreed confidential by Canada.

(1) Appellees' attack was not confined to alleged acts in the United States. Nor was the trial court's exercise of jurisdiction or its discovery orders. Appellees challenged every conceivable aspect of the foreign government cartel. Thus, I&M's March 1977 counterclaim, which first introduced the cartel into the case, alleged that the cartel fixed prices, divided territories, withheld uranium, established the terms of sale, and engaged in ancillary activities. When United filed its 55-page Second

Set of Interrogatories on August 16, 1977—which were the *first* interrogatories to mention the cartel—it asked for documents on every conceivable aspect of the cartel, including all prices, quotas, terms of sale, membership, employees, every meeting, every attendee, every conversation, all dues, every bid, every contract, every Canadian government communication with Gulf Canada, and a host of other matters. (See Appendix to this Brief.) The trial court ordered exhaustive discovery on all of these topics.

The claim that this case involved only acts done in the United States is a flat misrepresentation of the record, designed to mask the fact that the foreign government cartel became the central issue and the focus of discovery when United and I&M brought up the cartel in 1977.

(2) Appellees' argument is also plainly wrong in law. An allegation that illegal acts may have been done in the United States cannot give New Mexico courts power to compel unlimited production of Canadian documents which the Canadian government has decreed confidential. Since the Canadian non-disclosure law is an act of state—as even the New Mexico Supreme Court admits—the constitutional violation of the act of state and *Zschernig* doctrines is manifest.

B. Appellees' argument that the state court ordered no violation of Canadian law passes beyond sophistry. The Second Set of Interrogatories demanded the Canadian documents, and the New Mexico court gave General Atomic a choice: procure a violation of Canadian criminal law or suffer the largest default judgment in American history.

C. Appellees contend this case has nothing to do with foreign economic regulation or the production of foreign documents, but only a "pervasive" bad faith failure to make discovery about the foreign cartel.

Space limitations preclude a detailed answer to the many misrepresentations that underpin this charge. The following points, however, dispose of appellees' effort to disguise the foreign policy core of this case.

(1) The New Mexico Supreme Court twice admitted General Atomic was defaulted for failing to produce Canadian cartel documents. (A. 12a, 21a.) Appellees and the trial court sought these documents, as we have shown, to inquire into every aspect of the foreign governmental cartel. General Atomic's alleged "pervasive" failure of discovery was thus a failure to produce documents for such inquiry. But the trial court had no jurisdiction to conduct such an inquiry, since it had no jurisdiction over the foreign governmental cartel. Having no jurisdiction, the court could neither validly order General Atomic to produce Canadian documents which the court desired for that inquiry or default General Atomic for inability to produce them. (Even the New Mexico Supreme Court conceded the question of discovery could never arise if the trial court lacked subject matter jurisdiction.) (A. 18a-19a.) The allegations of "pervasive" failures of discovery are therefore legally irrelevant.

(2) Beyond this, the record disproves those allegations. Contrary to appellees' argument, it is clear that the documents could not have been obtained at any time for any purpose. Canada has explicitly told this Court that it is highly objectionable for American courts to seek the Canadian documents. Such efforts, which "cannot but have deleterious effects" on Canadian-American relations (Can. Br. 2-3), threaten Canada's sovereign authority to regulate its own economy. Canada therefore adopted its non-disclosure law the moment American legal process first sought the Canadian documents, and Canada unquestionably would have promulgated that law at once if anyone had supposed that United's first set of discovery requests sought the Canadian documents.

(3) Of course, no one did think the first set of discovery requests sought those documents. For the cartel was no part of the case until I&M filed its 1977 counterclaim many months after Canada enacted its non-disclosure law. Appellees' retroactive claim that the cartel was in the case from the beginning is conclusively belied by the fact that there is not one mention of it in United's

24-page speaking complaint, its 26-page amended speaking complaint, and its 70-question first set of interrogatories and document demands (which show on their face, incidentally, that they called for information on private agreements, not on a foreign governmental marketing arrangement.) (I&M Mot. 7-8, n.6)

(4) Since nobody, including United, thought that the cartel was relevant to the case or that cartel information was sought, it was impossible for General Atomic to have made a decision, in "pervasive bad faith," to hide cartel information. Far from "hiding" cartel information, General Atomic responded to United's first set of discovery requests by inviting United's counsel to examine virtually all of General Atomic's records. The records included documents relating to the cartel. United's counsel obtained these documents but did not suggest that other cartel documents, such as those in Canada, should be produced. They understood the case was not then about the cartel.

(5) Finally, General Atomic did not court legal impediments by hiding documents in Canada in anticipation of Canada's non-disclosure law. It is quite true that Gulf Canada's documents, including its cartel documents, were kept at its offices in Canada—as one would expect. The state supreme court concluded from this natural fact that impediments had been courted. Such an inference is baseless and impermissible, or else impediments are courted every time a foreign company engages in the normal practice of keeping its own documents in its own offices. An absence of courting is further shown because documents of General Atomic and Gulf relating to the cartel were kept in the United States and produced when called for. These documents provided appellees with extensive information about the cartel. These facts give the lie to claims of courting impediments.

Both factually and legally, therefore, the default judgment cannot be justified on the claim of "pervasive" bad faith in discovery. Rather, General Atomic was defaulted because Canadian criminal law prevented Gulf

Canada from supplying the documents the trial court demanded.

II. Appellants Were Denied Due Process Below.

Appellees present three major but erroneous arguments for claiming that General Atomic was not denied due process.

A. Appellees claim General Atomic had an evidentiary hearing, on November 14 and 16, 1977, on whether documents were housed or secreted in, or transported to, Canada in order to court legal impediments to their production in the United States. Appellees similarly claim that General Atomic was given, but rejected, other opportunities for an evidentiary hearing on relevant matters. Appellees' claims cannot survive scrutiny.

In *Roadway Express Inc.* v. *Piper*, 100 S. Ct. 2455, 2464 (1980), this Court stated that "[l]ike other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." The Court added that "[t]he due process concerns posed by an outright dismissal are plainly greater than those presented by assessing counsel fees against lawyers." *Id.* at n.14. These due process concerns were not met here, where default was imposed.

General Atomic had no notice of or opportunity for an evidentiary hearing on the record, on November 14 or 16, 1977, on allegations of housing or of transporting documents to Canada to avoid production. When the trial court announced the hearing, it did not even hint that such allegations would be the subject. Rather, it said the hearing would be limited to consideration of General Atomic's efforts to seek waiver of the Canadian non-disclosure law and to determining whether General Atomic had complied with United's demands for documents. (Tr. 5/48-49, 55.)

The claim that General Atomic was given, but rejected, other opportunities for an evidentiary hearing is equally untenable. Rather, General Atomic was twice denied evidentiary hearings it requested on good faith

in discovery. Indeed, the New Mexico Supreme Court's opinion devotes six pages to defending the propriety of defaulting General Atomic without an evidentiary hearing on good faith. (A. 165a-171a.) This was not relevant if General Atomic had been given, but rejected, opportunities for an evidentiary hearing.

B. Appellees also assert that no evidentiary hearing on good faith was required, because General Atomic's alleged bad faith in discovery is "mirrored" in the events of the case. This claim is legally insupportable. This Court has ruled that there must be "an opportunity for hearing on the record" before even the sanction of counsel's fees is assessed, and that due process concerns are even greater when a more severe sanction such as dismissal (or default) is imposed. But General Atomic received no hearing whatsoever on the record.

C. Appellees claim due process was not denied though the trial court made no effort to determine whether appellees were disadvantaged by the absence of Canadian documents. Appellees cite statements in the trial court's opinion alleging that the absence of the documents caused prejudice. The trial court's statements, however, are entirely conclusory; they offer no reasons whatever—none—for any assertion of disadvantage on any issue.[1]

Of equal importance, appellees do not even attempt to reply—because there *is* no reply—to General Atomic's major example of why they suffered no disadvantage. General Atomic's Jurisdictional Statement pointed out that, though United alleged that General Atomic had contracted for United's uranium in an effort to monopolize United States supplies, dispositive economic and business facts made such violation completely impossible, and these facts could not be changed by anything in the Canadian documents. (J.S. 27.) Appellees' failure even to

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[1] In actuality, the trial court's statements were only those of United. For as the New Mexico Supreme Court admitted, the trial court's opinion was written by United, with the trial court making only minor word changes. (A. 95a-96a.)

attempt to respond to this critically important point demonstrates in itself that due process was denied by the default because appellees were not disadvantaged on any dispositive issue by the absence of Canadian documents.

III. The Trial Court Lost Jurisdiction By Issuing Unconstitutional Injunctions.

Under federal law, the trial court lost jurisdiction when it retained the case by unconstitutionally enjoining General Atomic from exercising its federally guaranteed right to move the case into arbitration. Even United concedes that the cases we cite establish that a trial court acts without authority when it proceeds with a case after illegally barring a party from exercising its right to have the case heard elsewhere, and that the cases further establish this principle applies when a court proceeds with a trial after improperly refusing to permit arbitration. (UNC Mot. 23, 24 n.29.) Precisely such unauthorized and jurisdictionless proceedings occurred here. (J.S. 23-26.)[2]

United and I&M claim, however, that the trial court could proceed because General Atomic did not request a stay pending arbitration until November 30, 1977. This argument is legally incorrect and factually disingenuous.

It is legally incorrect because, as discussed above, a court loses jurisdiction to proceed when it bars a party from exercising a federal right to have a case heard elsewhere.

It is factually disingenuous for two reasons. First, as the judge and appellees well knew, General Atomic continuously displayed its desire that there be no proceedings in Santa Fe, but an arbitration elsewhere, by carrying two appeals all the way to this Court to secure

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[2] Contrary to United's claim, the Court in *Felter II* did not rule that the Santa Fe court retained jurisdiction to proceed with trial. It said only that its prior opinion in *Felter I* had not *prevented* the Santa Fe court from proceeding. There is a marked difference.

its right to arbitrate. Second, it was equally clear to all that, before the first injunction was lifted on November 28, 1977, it would have been futile for General Atomic to demand that the judge stop his proceedings in favor of the very remedy he had enjoined—arbitration.[3]

Finally, I&M suggests the trial court could proceed with an adjudication of I&M's case because I&M has no contract to arbitrate with General Atomic. To the contrary, when a third party has claims which are interrelated with arbitrable questions existing between two other parties, under the Federal Arbitration Act the third party must await the results of arbitration before obtaining judicial consideration of its case. *C. Itoh & Co., Inc.* v. *Jordan International Co.*, 552 F.2d 1228, 1231 (7th Cir. 1977), and cases cited therein. The wisdom of this rule is demonstrated here: if General Atomic can enforce its contractual right to obtain uranium from United, it will provide the uranium to I&M, and a uranium controversy between General Atomic and I&M will be eliminated or largely reduced.

IV. An Appeal Is the Proper Method of Review.

Appellees wrongly assert that an appeal does not lie here and that the appeal on loss of jurisdiction is untimely.

A. In the courts below, General Atomic appropriately drew in question the validity as applied of New Mexico's antitrust law and discovery rules as being repugnant to federal law. *See Japan Lines, Ltd.* v. *Los Angeles*, 441 U.S. 434, 440-41 (1979); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 288-90 (1921). The lower courts construed the state antitrust statute to apply to the foreign governmental cartel, and thus applied the state's discovery rules to reach documents in Canada, contrary to the Canadian non-disclosure law. General Atomic challenged these actions as violative of constitu-

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[3] Indeed, as stated by arbitrators Schaefer and Wirtz, "any further move toward arbitration [by General Atomic] would have invited contempt proceedings." (A. 346.)

tional principles. It stated that the act of state doctrine, and the *Zschernig* rule of exclusive federal power in foreign affairs, would be violated if New Mexico applied its antitrust law to the cartel or ordered production of documents in Canada. (E.g., Nov. 22, 1978 Brief filed in N. Mex. Sup. Ct. at 50, 59-60.)[4]

G. Appellants' appeal on the issue of loss of jurisdiction is timely. The decision of the New Mexico Supreme Court from which an appeal is taken on this question was rendered before its final judgment which dealt with the other issues on which appeal is sought. It is completely proper to seek review of an interlocutory decision when review is sought of the final judgment. Indeed, this is normally the *only* method of proceeding.

The timeliness of review at this date is not affected by the fact that review was previously sought, but rejected by this Court.[5] *Mercer* v. *Theriot*, 377 U.S. 152, 153-54

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[4] The same arguments had previously been made to the trial court (*e.g.*, R. 18196, 18370, 18388), and the New Mexico Supreme Court spent twenty-seven pages attempting to refute them. (A. 46a-73a.) Also, in a brief arguing that under federal law the trial court had lost jurisdiction because of its illegal injunctions, General Atomic challenged the lower court's authority to proceed, which it had done under the state antitrust law. This challenge, too, drew in question the application of that law.

Appeal is thus the correct procedure. But even were this not so, the questions at issue are of such importance that they deserve plenary review, either by appeal or certiorari.

[5] Appellees' argument that a hearing is precluded because the interlocutory decision was a final judgment is unavailing. In previously refusing a plenary hearing, the Court, of course, did not state whether the interlocutory decision was sufficiently final for review under the prevailing criteria, and though General Atomic hoped it was, there were factors militating against this hope. (*E.g.*, other federal constitutional questions, such as the applicability of the act of state and *Zschernig* doctrines, were still before the New Mexico Supreme Court.) Further, the finality rule does not mean that an allegedly "final" interlocutory decision *must* be reviewed here when rendered or the right of review is lost. It means only that it *can* be reviewed here when rendered, but can also be reviewed with the final judgment. Otherwise, (I) the finality rule

(1964); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257-58 (1916); Stern & Gressman, *Supreme Court Practice* §§ 2.2 and 3.12 (5th ed. 1978).

Respectfully submitted,

ROBERT H. BORK
142 Huntington Street
New Haven, Connecticut 06511
(203) 776-7662

JOHN BODNER, JR.
LAWRENCE R. VELVEL
BARBARA C. BIDDLE
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 783-0800

Counsel of Record for Appellant

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would conflict with the established principle that review of an interlocutory decision can be denied when it is rendered but can be granted later when the final judgment is reviewed, and (2) the rule would become a trap and would promote unnecessary appeals because parties would appeal interlocutory decisions rather than risk the possible loss of a right of review.